No. 79-1856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE EATON CORPORATION, *Petitioner*

v.

OLGA J. FOX, *Respondent*

On Petition For Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

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SUPPLEMENTAL MEMORANDUM OF PETITIONER

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This supplemental memorandum is filed to call the Court's attention to a recent Ninth Circuit decision not available when Eaton filed its earlier supplemental memorandum. The case, *Cooper v. Bell,* 628 F.2d 1208 (9th Cir. 1980), is yet another example of the continued confusion and conflict among the Circuits over the existence and application of a tolling doctrine to Title VII time requirements.

Ironically, the Solicitor General and the Equal Employment Opportunity Commission, in their brief as *amici curiae,* have quoted *Cooper* for the proposition that "there is now an 'emerging consensus' that 'Title VII filing periods are subject to equitable extension.' " (Brief at 9.) In fact, the *Cooper* Court's difficulty in deciding the appropriate role of a tolling doctrine in the context of Title VII time requirements is a direct result of the uncertainty posed by decisions of this Court and the confusion and conflict which have prevailed among the Circuits.

Indeed, even the Ninth Circuit's very reference in *Cooper* to a consensus that "seems to be" emerging among the circuit courts was accompanied by the citation of conflicting circuit court decisions, 628 F.2d at 1212, and by an express acknowledgment that "the Supreme Court has referred to the filing periods both ways [*i.e.*, as both jurisdictional prerequisites and as statutes of limitations]." *Id.* at 1212 n.7. Moreover, the court in *Cooper* took pains to confine its approval of tolling to administrative filing periods, continuing to cite with apparent approval its earlier decisions construing compliance with the time period between administrative action and court suit as "jurisdictional," and expressly noting the problem that would inhere in attempting to apply the tolling doctrine to the time period for filing suit which is involved in the instant case:

> The arguments in favor of equitable tolling are weakest regarding the third filing period, the time for commencement of court action. Congress expressly premised federal court jurisdiction on prior exhaustion of administrative remedies by providing that a federal employee could bring an employment discrimination suit within thirty days of receiving notice of final administrative action. 42 U.S.C. § 2000e-16(c) (1976). One possible interpretation of this provision is that it creates a temporally limited cause of action: if suit is not brought within thirty days, the cause of action expires. *See, Kirk* v. *Rockwell Int'l Corp.*, 578 F.2d 814, 823 (9th Cir.) (Hufstedler, J., concurring), *cert. denied*, 439 U.S. 1004, 99 S.Ct. 616, 58 L.Ed.2d 680 (1978). *But see, Bethel* v. *Jefferson*, 589 F.2d 631, 641-42 and n.64 (D.C.Cir. 1978). Furthermore, the employee is less likely to be harmed by rigid time limits at this stage of the proceedings than at the earlier two stages. By the time the third limitation period is triggered by the employees receipt of a right to sue letter, the employee has received counselling and has been expressly informed of his obligation to go forward within the thirty-day filing period.

All of the Ninth Circuit cases that have referred to Title VII filing periods as "jurisdictional" have involved the third filing period. *See, Mahroom* v. *Hook,* 563 F.2d 1369 (9th Cir. 1977), *cert. denied,* 436 U.S. 904, 98 S.Ct. 2234, 56 L.Ed.2d 402 (1978); *Cleveland* v. *Douglas Aircraft Co.,* 509 F.2d 1027 (9th Cir. 1975); *Wong* v. *The Bon Marche,* 508 F.2d 1249 (9th Cir. 1975). *Id.* at 1213-14 n.10.

The *Cooper* case also illustrates how circuit courts which have applied the tolling doctrine at all are in serious conflict over the circumstances in which it can appropriately be applied. The Ninth Circuit in *Cooper* established no fewer than seven stringent requirements that the party seeking tolling "must prove," including proof of "affirmative misconduct" by the party against whom relief is sought. *Id.* at 1214. In sharp contrast, the Sixth Circuit in the instant case applied a broad concept of forgiving "reasonable mistakes" and allowed tolling even while conceding that the plaintiff had made no claim of having been misled but had acted on "her own" (App. to Original Petition at 9a, n.5).

Thus, contrary to the assertion of the Solicitor General, a close examination of *Cooper* reveals that circuit courts continue to struggle with the various dicta of this Court and the conflicting circuit court opinions. In *Cooper,* the Ninth Circuit joins the various other Circuits discussed in the original petition in offering yet another position along the spectrum of opinion as to what if any Title VII time periods can be tolled, and the standards of conduct which will invoke such tolling.

Respectfully submitted,

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